SAPITA SDN BHD

v.

ASIANA PROPERTIES

COURT OF APPEAL, PUTRAJAYA
ABDUL MALEK AHMAD PCA
RICHARD MALANJUM JCA
AUGUSTINE PAUL JCA
[CIVIL APPEAL NO: W-04-88-2001]
24 JANUARY 2005

CONTRACT: *Agency - Sale of land - Whether principal/vendor represented by agent at negotiations for sale of land - Whether such agent authorised to pay commission to broker - Whether principal/vendor bound by promises/ contract made by agent - Evidence of agency - Consequence of not calling material witnesses*

The respondent/real estate broker ('the broker') had arranged a series of negotiations between a prospective land purchaser ('the purchaser') and the appellant/vendor ('the vendor'). The vendor was represented by its solicitor ('the solicitor') and, apparently, its accountant ('the accountant') at the negotiations which were conducted in the presence of the broker's representatives. As it transpired, the accountant had signed a letter ('the letter') on behalf of the vendor agreeing to pay the broker a 2% commission ('the commission') on the sale of the land in question. Subsequently, however, the vendor refused to pay the commission after the execution of the sale and purchase agreement. The broker thus commenced an action against the vendor for the recovery of RM37,000 being the sum of the commission promised.

It was contended, for the vendor, that it had never promised to pay any commission to the broker nor had it ever appointed the accountant as its agent or representative for the negotiations. The sessions judge found for the vendor, holding that only the solicitor had been appointed as the vendor's agent or representative and, further, that even the solicitor was not authorised to pay any brokerage commission or to appoint a sub-agent. On appeal, however, the High Court reversed the sessions judge and held that the accountant was indeed a lawful agent of the vendor and that her promise to pay the broker the commission bound the vendor. The learned judge so concluded on account that: (i) the accountant was in the employ of the vendor, and thus anyone having dealings with the vendor would have regarded her as an employee of the vendor; (ii) the accountant was very

much present at the negotiations which took place as between the solicitor and the purchaser, and there was no evidence of any objection whatsoever from the vendor in respect thereof; (iii) the negotiations took place at the solicitor's office and the accountant was present thereat, thus implying that she was also representing the vendor; and (iv) the letter signed by the accountant had the vendor's company chop on it, and there was no allegation of any fraud being committed by the accountant in respect thereof. Dissatisfied, the vendor brought the matter before the Court of Appeal.

Held (dismissing the appeal)
Per Abdul Malek Ahmad PCA delivering the judgment of the court:

[1a] The witnesses called on behalf of the broker, including the purchaser, had testified that the vendor was represented by both the solicitor and the accountant at the negotiations. (pp 353 h, 354 a-c & 356 a-c)

[1b] Apart from its managing director who testified that the accountant was not its agent or representative for the negotiations, the vendor did not call any other witnesses. Both the solicitor and the accountant were not called. (pp 353 h, 354 a-c & 356 a-c)

[1c] Both the testimony of the witnesses called and the documentary evidence adduced showed that "there was a legally binding contract and that commission was agreed upon and payable". (pp 353 h, 354 a-c & 356 a-c)

[1d] The failure of the vendor to call the solicitor and the accountant to testify weighed heavily against it. The High Court was therefore right in concluding that the commission must be paid to the broker. (pp 353 h, 354 a-c & 356 a-c)

*[**Bahasa Malaysia** Translation Of Headnotes*

Responden/broker hartanah ('broker') telah mengatur beberapa rundingan di antara seorang bakal pembeli tanah ('pembeli') dengan perayu/penjual ('penjual'). Dalam perundingan yang dihadiri oleh wakil broker tersebut, penjual diwakili oleh peguamcaranya ('peguamcara'), dan kelihatan juga oleh akauntannya ('akauntan'). Seperti yang berlaku, akauntan telah menandatangani sekeping surat ('surat') bagi pihak penjual bersetuju untuk membayar komisyen kepada broker sebanyak 2% ('komisyen') dari penjualan tanah. Penjual, bagaimanapun, kemudian enggan membayar komisyen setelah perjanjian jual beli tanah tersebut dimeterai. Broker dengan itu memulakan guaman terhadap penjual menuntut komisyen yang dijanjikan berjumlah RM37,000.

Bagi pihak penjual, ianya dihujahkan bahawa ia tidak pernah berjanji untuk membayar komisyen kepada broker ataupun melantik akauntan sebagai agen atau wakilnya dalam rundingan. Hakim sesyen membuat keputusan yang berpihak kepada penjual, dengan mengatakan bahawa hanya peguamcara yang dilantik sebagai agen atau wakil penjual, dan bahawa, peguamcara tersebut itupun tidak diberi kuasa untuk membayar komisyen atau melantik sub-agen. Bagaimanapun, di rayuan, Mahkamah Tinggi telah mengakas keputusan hakim sesyen sekaligus memutuskan bahawa akauntan, sebenarnya, adalah seorang agen yang sah kepada penjual dan bahawa janjinya untuk membayar komisyen kepada broker telah mengikat penjual. Asas bagi keputusan yang arif hakim adalah bahawa: (i) akauntan bekerja dengan penjual, dan dengan itu sesiapa sahaja yang berurusan dengannya akan menganggapnya sebagai pekerja penjual; (ii) akauntan sentiasa hadir dalam rundingan di antara peguamcara dan pembeli, dan tiada bantahan dibuat oleh penjual berkenaan kehadirannya itu; (iii) rundingan diadakan di pejabat peguamcara dan akauntan hadir di situ, sekaligus memberikan gambaran bahawa beliau juga mewakili penjual; dan (iv) surat yang ditandatangani oleh akauntan bercop dengan cop syarikat penjual, dan tiada dakwaan fraud dibuat terhadap akauntan mengenainya. Tidak berpuas hati, penjual membawa perkara ke Mahkamah Rayuan.

Diputuskan (menolak rayuan)

Oleh Abdul Malik Ahmad PMR menyampaikan keputusan mahkamah:

[1a] Saksi-saksi yang dipanggil bagi pihak broker, termasuk pembeli, telah memberikan keterangan bahawa dalam rundingan penjual adalah diwakili oleh kedua-dua peguamcara dan akauntan.

[1b] Selain dari pengarah urusan penjual yang mengatakan bahawa akauntan bukanlah agen atau wakilnya dalam rundingan, penjual tidak memanggil mana-mana saksi lain. Kedua-dua peguamcara dan akauntan tidak dipanggil.

[1c] Keterangan kedua-dua saksi yang dipanggil dan keterangan dokumentari yang dikemukakan menunjukkan bahawa "wujud suatu kontrak yang mengikat dan bahawa komisyen memang telah dipersetujui dan perlu dibayar".

[1d] Kegagalan penjual untuk memanggil peguamcara dan akauntan untuk memberi keterangan amat menjejaskan mereka. Mahkamah Tinggi dengan itu betul apabila meru muskan bahawa komisyen perlu dibayar kepada broker.

For the appellant/vendor - Manjit Singh Saini; M/s Harun Idris, Yeoh & Partners
For the respondent/broker - Jasbir Kaur; M/s Manjeet & Assoc

[Appeal from High Court; Kuala Lumpur; Civil Appeal No: R2-12-108-98]

Reported by Gan Peng Chiang

JUDGMENT

Abdul Malek Ahmad PCA:

The respondent is a real estate agent and, being aware that the appellant was desirous of selling its land situated at 128 Jalan Tun Sambanthan, Kuala Lumpur, arranged meetings for negotiations between the purchaser and the appellant's representatives in the presence of the respondent's representatives.

At the negotiations, the appellant was represented by their solicitor Azlan Nor (Azlan) and their part time accountant Tham Lee King (Tham). The latter signed a letter dated 11 September 1995 on the appellant's behalf agreeing to pay the respondent a two percent commission in respect of the sale of the said land. However, after the execution of the sale and purchase agreement, the appellant refused to pay the said commission.

Accordingly, the respondent commenced an action to recover the amount of RM37,000 as commission owed for services rendered by the respondent as estate agent in effecting the sale of the appellant's land.

It was the contention of learned counsel for the appellant that it never made the promise to pay any commission to the respondent as Tham was never appointed as their agent. The managing director of the appellant gave evidence that the appellant only appointed Azlan as its agent in the transaction as Tham was only employed as the person in charge of the appellant's accounts.

The only issue before us was whether Tham acted as agent of the appellant in the transaction. The learned Sessions Court Judge was of the view that only Azlan acted as the appellant's agent and that there was no evidence that the appellant had authorised Azlan to appoint a subagent or to pay any commission. Further, if he did, Azlan was acting beyond his agency and his actions did not bind the appellant.

On appeal, the learned High Court Judge found otherwise. He held that Tham was the appellant's agent and her actions bound the appellant for the following reasons:

(a) it was not in dispute that Tham was employed by the appellant as the person in charge of its accounts – consequently anyone with dealings with the appellant would regard Tham as an employee of the appellant;

(b) it was also not in dispute that Tham was present at the negotiations between the purchaser and Azlan and there was nothing on record to indicate that Tham's presence at the negotiations was objected to by anyone including Azlan;

(c) the negotiations took place in Azlan's office which is in the same building as the appellant – it could therefore be assumed that Tham was representing the appellant as otherwise why should she be there?

(d) there was no allegation of fraud committed by Tham – in fact she signed the letter with the appellant's chop on it agreeing to pay the disputed commission.

Consequently, the learned High Court Judge, in holding that Tham was the lawful agent of the appellant, allowed the respondent's appeal with costs.

Before us, learned counsel for the appellant argued that the Sessions Court had made a finding of fact that there was no agreement for a commission and accordingly, there was no substance in the respondent's claim for such. Further, Tham was not called as a witness as she could not be traced and the original of the relevant letter for commission was not produced. In that regard, the learned Sessions Court Judge had ruled it to be inadmissible.

Learned counsel for the respondent submitted that the managing director of the appellant had told the court that Tham was in charge of sales and that both Azlan and Tham were present at the negotiations with the respondent. The agreement to pay the disputed commission, she added, was made by the appellant through the letter and accordingly, the sale had proceeded to its full conclusion.

It is pertinent to reproduce the relevant letter:

ASIANA PROPERTIES
Registered Real Estate Agents

Brickfields
50480 Kuala Lumpur

Tel: 03-2749571
2747812

Fax: 03-2737201

11th September, 1995

Date:

Ms. Tham Lee King,
M/s Harun Idris, Yeoh & Partners
5th Floor, Wisma Dato' Dagang
Jalan Raja Alang
Kuala Lumpur

Dear Ms. Tham,

Re: Sale of Property known as No. 128, Jalan Tun Sambathan, Brickfields, Kuala Lumpur

We refer to the above matter.

We also refer to the meeting between your goodself, Encik Azlan, our prospective client/buyer – Mr. Theivandran R. and the undersigned on the 29th August, 1995 at your office.

It has been suggested by your goodselves that Mr. Theivandran should pursue all documentation enquiry and offer through his lawyer to the Vendor's solicitors.

We also understand from the said purchaser that he has paid an earnest deposit of 5% towards the above transaction.

As such, as your goodself is aware, our commission of two percent in this transaction is payable upon the signing of the Sale & Purchase Agreement.

Thanking you.

Yours faithfully,
M/s Asiana Properties

Sgd.
Kuldip Kaur

I hereby agree &
acknowledge receipt
the above

Sgd
THAM LEE KING
SAPITA SDN BHD.

Having considered all the arguments we formed the view, which was unanimous, that the only issue was as regards the commission payable for the sale and purchase transaction of the appellant's land. The respondent had called the purchaser and their manager and agent to testify that the appellant's representatives at the relevant meetings were Azlan and Tham but the managing director of the appellant, who was the only witness for the appellant, maintained that only Azlan was her agent although Tham helped in their accounts. The appellant did not call either Azlan or Tham to give evidence and so we are left with the evidence of the respondent's witnesses. From the evidence and the documents produced, it is obvious that there was a legally binding contract and that commission was agreed upon and payable. The non calling of Azlan and Tham is a factor against the appellant and we are totally in agreement with the High Court Judge that commission is payable on the transaction.

Accordingly, the appeal is dismissed with costs and the deposit is to go to the respondent to the account of taxed costs.